

Alamo Orchard Company  
201A Bill Shaw Road  
Pateros, WA 98846-9613

February 21, 2003

Public Information and Records  
Integrity Branch (PIRIB)  
Office of Pesticide Programs (OPP)  
Environmental Protection Agency (7502C)  
1200 Pennsylvania Ave., NW.  
Washington, DC 20460-0001  
Attention: Docket ID Number OPP-2003-0010

RE: Request for Public Comment on Advanced Notice of Proposed  
Rulemaking to  
promulgate "counterpart regulations" under the Endangered Species Act (ESA).  
68  
FR 3785, 1/24/03; Docket ID No. OPP-2003-0010

Dear Sir/Madam,

Alamo Orchard Company ("Alamo") hereby submits comments and viewpoints on the Advanced Notice of Proposed Rulemaking (ANPR) to promulgate "counterpart regulations" under the Endangered Species Act (ESA). Alamo owns and farms apple and pear orchards in eastern Washington State near the Columbia River.

The availability of safe and effective agricultural products is of particular concern to our organization. People don't eat apples or pears with worms inside them. People don't buy fruit that looks diseased. Therefore, it is essential that the proposed counterpart regulations ensure the efficient and timely registration and reregistration of safe and effective agricultural products, in addition to the protection of endangered and threatened species and their habitats.

When the agencies make it expensive to register chemicals for "minor" crops like apples and pears, then we American growers are made even less competitive with foreign growers that we are at present. Then what happens is that more foreign fruit comes into the American markets. Who is going to go check the foreign orchards to see what chemicals they used? Nobody is! So our own governmental agencies are being used to give unfair advantages to foreign growers. The idea that the FDA can adequately check inbound shipments of foreign fruit is a pipe dream. American growers will suffer and go out of business from the realistic fact of imported fruit that is mostly unchecked.

Alamo and its management are very encouraged by the cooperative effort undertaken by the U.S. Environmental Protection Agency (EPA), Fish and Wildlife Service (FWS), National Marine Fisheries Service (NMFS), and Department of Agriculture. The above-noted Advanced Notice of Proposed Rulemaking (ANPR) is a milestone proposal in recommending the promulgation of counterpart regulations to the Endangered Species Act (ESA). This is an ambitious undertaking, but one that we strongly support. The issues addressed by the ANPR are of significant importance to our industry and we believe that this collaborative and comprehensive approach will result in an enhanced process

that will ensure appropriate protection to listed species and their habitats, make endangered species assessments more uniform and consistent for products regulated under the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA), and develop a pesticide regulatory process that provides for the efficient and timely registration of safe and effective agricultural products.

Currently, EPA faces six lawsuits challenging the Agency's compliance with the ESA in its FIFRA pesticide regulatory program; additional lawsuits may be forthcoming. These legal challenges do not help the cause of species protection. Rather they divert important resources and prevent the implementation of protections for listed species. Moreover, they can result in conflicting standards, ad hoc judicial determinations, and processes that vary from one jurisdiction to another. At worse, these lawsuits may result in indiscriminate bans or restrictions on pesticide use, may eliminate safe products because of inadequate or inaccurate data, may increase the costs of crop protection products, and may spur additional "copycat" litigation.

In order to prevent this chaotic approach, EPA must regain control of the process. EPA must be afforded both the responsibility and the authority for carrying out adequate product assessment and species protection in an efficient and consistent manner. Accordingly, we strongly recommend that EPA's Office of Pesticide Programs be identified as the expert agency under the designation allowed by ESA Section 402.07. Under FIFRA, EPA is already obligated to undertake a very rigorous scientific and ecological risk assessment analyses in the registration and reregistration of pesticides. This analysis is subject to significant scrutiny and conforms to the best available levels of scientific methodology. Additionally, along with each registration and reregistration application, EPA receives and reviews a tremendous amount of information, such as environmental fate, exposure, and ecotoxicology studies, addressing the safety of particular products to non-target organisms including endangered and threatened species. EPA is in the best position to make informed analyses and determinations in pesticide endangered species risk assessment and risk management matters.

Furthermore, we support giving EPA the authority and responsibility of making "not likely to adversely affect" determinations without requiring further consultation with or concurrences from FWS and NMFS. Under the current process, these determinations must be made in consultation with or with the concurrence of the Services. This step, however, is completely unnecessary and serves no purpose other than to lengthen the already extensive process. As noted above, EPA has the relevant and necessary expertise for making such determinations. Removing this step from the process may be the most effective way to truly streamline the consultation process and mesh the EPA pesticide regulatory process with the requirements of the ESA.

This does not mean that the Services' opinions should be excluded. The process could include an opportunity for the Services to object to an EPA "not likely to adversely affect" determination where they (the Services) provide evidence that EPA failed to follow proper procedures in reaching the determination, or failed to assess the data in a scientifically sound manner. In other words, EPA's determination would be afforded deference and the Services would bear the burden of establishing that EPA's findings are flawed. Rather, the Services' reviews and objections should be limited to three areas,

in order to avoid wasteful repetition of assessments already conducted by EPA.

- o Has EPA considered the most current and best available scientific, commercial and technical information?
- o Are those determinations genuinely not arbitrary and capricious?
- o Is there clear and convincing information warranting a different conclusion as to the effects of the proposed registration?

Alamo clearly understands the need for this rulemaking process and supports the Agencies' cooperative efforts in developing this ANPR. This is a significant step toward providing enhanced protection for endangered and threatened species and their habitats, and simultaneously developing a more efficient pesticide regulatory program for the registration of safe and effective agricultural products. Accordingly, Alamo strongly supports this effort and applauds the effort undertaken by the EPA, FWS, NMFS, and the Department of Agriculture.

Thank you for your attention to our viewpoints and comments.

Alamo Orchard Company  
Sincerely,  
Carl Brenner, President